Supreme Court, U.S.
FILED
001030 DEC 22 2000
OFFICE OF THE CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GRANT VENEY LEE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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December 22, 2000

Balmar Legal Publishing Services, Washington, DC 202-682-9800

37 pp

QUESTIONS PRESENTED

1. An instruction directed the jury to find that the charged offense occurred within the territorial jurisdiction of the United States. Did this instruction, which the Fourth Circuit affirmed contrary to decisions of the United States Court of Military Appeals and the Sixth and Ninth Circuits, violate Petitioner's Sixth Amendment and due process rights to a jury determination of all elements of the offense beyond a reasonable doubt?

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PETITION FOR A WRIT OF CERTIORARI

Grant Veney Lee ("Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is reprinted in the Appendix at pp. 1a-8a, *infra*. The district court did not issue an opinion accompanying the judgment of conviction.

JURISDICTION

The court of appeals entered its judgment on September 26, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution provides that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Article I, § 8, clause 17 of the United States Constitution provides that Congress shall have the power:

> To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be,

for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings.

18 U.S.C. 2241(a)(1) is as follows:

Aggravated Sexual Abuse

(a) By force or threat.- Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly causes another person to engage in a sexual act-

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subject to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 7(3) is as follows:

The term "special maritime and territorial jurisdiction of the United States", as used in this title, includes:

* * * *

(3) Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States by the consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Federal Rule of Evidence 201 provides:

(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by

resort to sources whose accuracy cannot reasonably be questioned.

* * * *

(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

STATEMENT OF THE CASE

After his first trial ended in a hung jury on two counts of the indictment and acquittal on the third, petitioner Grant V. Lee ("Petitioner") was retried in August 1999 and convicted of aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1). Petitioner was sentenced to 210 months in prison. At his second trial, the court took judicial notice, based on no record evidence, that the alleged crime occurred within the "special maritime and territorial jurisdiction of the United States." The trial court completely removed this jurisdictional element of the offense from the jury by failing to instruct under Fed. R. Evid. 201(g) that the jury was not required to accept any judicially noticed fact.

Petitioner and the complaining witness in this case, LL,[1] were employed by an organization that provides vocational services and employment for disabled persons to perform cleaning duties at the Defense Logistics Agency ("the DLA") located on the grounds of Fort Belvoir. JA 71;222. LL, who has moderate to severe mental retardation and cerebral palsy, testified at trial that Petitioner sexually assaulted her in the basement of a DLA building. JA 79; 117-120. A medical examination of LL was consistent with sexual activity on the day of the alleged assault. JA 180-82;184. Petitioner denied

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[1] The alleged victim has been referred to throughout the briefing in this case only by her initials in order to preserve her privacy.

having intercourse with LL on the day in question. JA 225, 229, 231. No physical evidence, such as DNA or hair fibers, linked Petitioner to LL. JA 144; 182; 188; 191; 312; 314; 316; 320; 322.

At no point during the trial did the government offer any evidence relating to the jurisdictional boundaries of Fort Belvoir and specifically, whether the DLA building where the assault allegedly occurred was within the special maritime and territorial jurisdiction of the United States. Upon submission of the case to the jury, however, the district court directed a verdict on this element of the offense and totally removed it from the jury's consideration:

> The Government must prove as one of the elements required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States. The Government has offered evidence that the assault or aggravated assault charged in the indictment occurred at Fort Belvoir, Virginia. The Court has taken judicial notice that Fort Belvoir, Virginia is within the jurisdiction of the United States for purposes of this statute. If you find that the offense occurred at Fort Belvoir, Virginia, then you may find that this element has been proved. If you find that the offense did not occur at Fort Belvoir, Virginia, then it is your duty to find the defendant not guilty.

App., *infra*, p. 11a. Petitioner's court-appointed counsel did not object to this instruction.

The court did not instruct the jury as to any of the facts that must be found to establish "special maritime and territorial jurisdiction of the United States" as used in 18 U.S.C. § 2241(a)(1). That term is defined in 18 U.S.C. § 7(3) as:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent

> jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Property does not fall within "the special maritime and territorial jurisdiction of the United States" simply because it is on federally controlled land. Rather, the Constitution and applicable federal and State statutes provide a specific procedure that must be followed for an area to come within this federal jurisdiction. Under Art. I, § 8, cl. 17 of the United States Constitution, exclusive or concurrent federal jurisdiction requires the consent of the State where the property is located and absent such consent, possession by the United States is in the nature of an ordinary proprietor. *Paul v. United States*, 371 U.S. 245, 264 (1963). The State must formally cede jurisdiction to the federal government. The State of Virginia has given its conditional consent to the federal government's concurrent jurisdiction over lands in Virginia acquired for forts and other federal uses, but this cession is effective only as to lands the federal government acquires on or after July 1, 1981. Va. Code Ann. § 7.1-18.1 (1999). The government offered no evidence regarding whether, when and how the State of Virginia ceded jurisdiction over parts of Fort Belvoir acquired before July 1, 1981.

The required procedures by which the United States can accept the State's cession of jurisdiction have also changed over time. Under 40 U.S.C. § 255, for property acquired by the federal government after 1940, the State must formally cede jurisdiction and the federal government must expressly accept jurisdiction by filing a notice of acceptance with the governor of the State or by any other manner provided under State law. For property acquired by the federal government prior to 1940, acceptance of the State's cession of jurisdiction was presumed absent evidence to the contrary. *Paul*, 371

U.S. at 265; *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 528 (1885).

Because property comprising a federal installation may be acquired at different times and in different ways, determining the jurisdictional status of any property occupied by the federal government requires factual determinations of (1) the jurisdictional status of the location at issue (2) when and how the State ceded jurisdiction over that location and (3) if the State ceded jurisdiction after 1940, the formal acceptance of jurisdiction by the United States. Jurisdiction over a crime committed on a military base accordingly often depends on the jurisdictional status of the exact location of the crime. The Government itself has expressly recognized the necessity for introducing evidence of "special maritime and territorial jurisdiction" in cases such as this, given the complexity of that determination: "Each United States Attorney would be well advised to request from each agency within the district a report on the jurisdictional status claimed for each of its facilities and assurance that documentation is available." U.S. Attorney's Manual, Criminal Resource Manual No. 665 (2000 Supplement).[2] The jurisdictional boundaries of Fort Belvoir are unclear, since the government introduced no evidence regarding (1) the jurisdictional status of the particular area (the DLA building) where the crime allegedly occurred; (2) the ceding of jurisdiction by the State of Virginia (3) the acceptance of jurisdiction by the United States or (4) when the United States acquired the property on which the DLA is located.

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[2] The Supreme Court of Virginia has also recognized the complexity of this determination: "The question whether a Federal area within a State is subject to exclusive jurisdiction of the United States is complicated and often difficult to decide. A determination depends upon many factors, jurisdiction being subject to the terms, conditions, restrictions, limitations and provisions of the acquisition by the United States, including the consent of the State . . . and acceptance by the United States." *Western Union Tel. Co. v. Commonwealth*, 204 Va. 421, 426 (1963) (citations omitted).

On appeal,[3] Petitioner argued that the district court violated his Sixth Amendment and due process rights to have a jury find all elements of the offense beyond a reasonable doubt. Petitioner contended that the trial court usurped the jury's function by taking judicial notice of the jurisdictional element of the offense without instructing the jury that it need not accept such judicial notice. The Fourth Circuit rejected that argument, holding that the government was entitled to a directed verdict on the jurisdictional element of the offense:

> Lee also claims that the government failed to prove that the rape occurred in an area under Federal jurisdiction. The district courts have jurisdiction over offenses committed on military bases . . . . A district court may take judicial notice that the crime being prosecuted occurred within Federal jurisdiction . . . . Here, the indictment charged that the crime occurred at Fort Belvoir, Virginia. Fort Belvoir's location was generally known in the Alexandria Division of the Eastern District of Virginia and verifiable from "sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b). Accordingly, we find no error in the district court's taking judicial notice of this fact.

App., *infra*, p. 7a (citations omitted). The Fourth Circuit did not identify any basis for its finding that the jurisdictional facts were "generally known" or "verifiable." The Court of Appeals also did not address Petitioner's claim that the district court was required to give the cautionary instruction mandated by Fed.R.Evid. 201(g) that the jury in a criminal case need not accept as conclusive facts judicially noticed.

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[3] Petitioner timely filed his Notice of Appeal on November 16, 1999, premising jurisdiction in the Court of Appeals on 28 U.S.C. § 1291.

REASONS FOR GRANTING THE PETITION

The district court wrongly removed the determination of an element of the offense from the jury, in violation of Petitioner's Sixth Amendment and due process rights to have a jury decide all elements of the crime beyond a reasonable doubt. The Fourth Circuit -- like the three other Circuits that have ruled the same way -- fundamentally misunderstood the complex factual inquiry required to determine whether the location of the alleged crime was within "the special maritime and territorial jurisdiction of the United States." The Fourth Circuit further disregarded the express dictates of Congress, embodied in Fed. R. Evid. 201(g), that the jury in a criminal case must be instructed that any judicially noticed facts are not binding on the jury.

These issues have sharply divided the Courts of Appeals. The Court of Military Appeals and the Sixth and Ninth Circuits have held, consistent with this Court's precedent regarding the right to jury trial, that judicial notice of any element of a federal offense, including jurisdictional elements, violates the defendant's right to jury trial if a Rule 201(g) instruction is not also given.[4] Contrary holdings in the Second, Fourth, Fifth and Tenth Circuits permit the district court to direct a verdict on the jurisdictional element of a federal crime.[5] The First and Third Circuits have not expressly reached the issue, but have strongly intimated that judicial notice of the jurisdictional element of a federal

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[4] *United States v. Williams*, 17 M.J. 207, 212 (C.M.A. 1984); *See United States v. Mentz*, 840 F.2d 315, 320-24 (6th Cir. 1988); *United States v. Dior*, 671 F.2d 351, 358 n.11 (9th Cir. 1982).

[5] In addition to the Fourth Circuit's opinion in this case, *see United States v. Gaither*, Nos. 95-5617, 95-5618, 95-5619, 1996 WL 191736 (4th Cir. April 22, 1996); *United States v. Lavender*, 602 F.2d 639 (4th Cir. 1979). *See also United States v. Hernandez-Fundora*, 58 F.3d 802, 807-812 (2d Cir. 1995); *United States v. Bowers*, 660 F.2d 527, 530-31 (5th Cir. 1981); *United States v. Piggie*, 622 F.2d 486 (10th Cir. 1980).

offense violates the Sixth Amendment if a Rule 201(g) instruction is not given.[6]

This conflict threatens the consistent application of federal criminal statutes throughout the country. Had Petitioner been charged with this federal crime -- for which he will spend the next seventeen years in prison -- in federal court in Ohio or California, for example, or in the military courts, any conviction would have been reversed for failure to prove the jurisdictional element of this offense beyond a reasonable doubt. Moreover, this issue has broad applicability: numerous federal statutes require proof that the crime occurred within the "special maritime and territorial jurisdiction of the United States."[7] This Court should therefore resolve the split among the Courts of Appeals in order to achieve uniform application of federal criminal laws requiring proof of a jurisdictional element.

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[6] *United States v. Bello*, 194 F.3d 18, 24-26 (1st Cir. 1999); *United States v. Thomas*, 610 F.2d 1166, 1171 n.10 (3d Cir. 1979)

[7] *See, e.g.*, 18 U.S.C. § 2242 (sexual abuse); 18 U.S.C. § 2243 (sexual abuse of a minor); 18 U.S.C. § 2244 (abusive sexual contact); 18 U.S.C. § 2252A (child pornography); 18 U.S.C. § 1111 (murder); 18 U.S.C. § 1112 (manslaughter); 18 U.S.C. § 1201 (kidnapping); 18 U.S.C. § 1363 (malicious harm to real or personal property); 18 U.S.C. § 1460 (possession of obscene material); 18 U.S.C. § 81 (arson); 18 U.S.C. § 113 (assault); 18 U.S.C. § 661 (theft); 18 U.S.C. § 662 (possession of stolen property); 18 U.S.C. § 2111 (robbery); 18 U.S.C. § 2119 (motor vehicle theft). Moreover, the Assimilative Crimes Act (18 U.S.C. § 13) makes it a federal crime to commit an act within the special maritime and territorial jurisdiction of the United States that would be a crime within the State where the acts occurred, thereby sweeping innumerable other traditionally State offenses within federal criminal jurisdiction. This Court's insistence on the limits of federal criminal power highlights the need for uniformity regarding judicial notice of the only element making the conduct a federal offense. *See, e.g., Cleveland v. United States*, No. 99-804, 2000 WL 1663649, * 8 (U.S. Nov. 7, 2000); *Jones v. United States*, 529 U.S. 848, 858 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

I. This Court Should Resolve A Conflict Among the Circuits Regarding Judicial Notice of An Element of a Federal Criminal Offense

The Court of Military Appeals, which frequently must resolve questions about the jurisdictional status of federal installations, has concluded that judicial notice of such jurisdictional facts is improper. That court has specifically recognized the complicated factual nature of the jurisdictional inquiry, and held that this inquiry can be undertaken only by the jury. In *Williams*, the government charged defendant under 18 U.S.C. § 1201(a)(2) for a kidnapping that occurred at Fort Hood, requiring the government to prove federal jurisdiction under 18 U.S.C. § 7(3). The *Williams* court ordered an evidentiary hearing to determine whether the specific location of the kidnapping was under federal jurisdiction. As a result of that hearing, the court determined that, although a large part of Fort Hood was under federal jurisdiction, the United States never acquired exclusive or concurrent jurisdiction over almost 50,000 acres of the fort because it did not take the necessary constitutional and statutory steps described above to establish such jurisdiction. *Williams*, 17 M.J. at 211. The court then held that it would not take judicial notice of Fort Hood's jurisdictional boundaries. First, the court held that judicial notice could not be taken pursuant to Mil. R. Evid. 201(b)(1),[8] because nothing in the record indicated that the necessary facts regarding Fort Hood's jurisdictional status were "generally known." *Id.* at 214. Given the complexity of determining those jurisdictional boundaries, the court held that the factual prerequisites were not "capable of accurate and ready determination by resort to

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[8] The military evidence rules on judicial notice are substantially the same as Fed. R. Evid. 201. Mil. R. Evid. 201(b)(1) requires that a judicially noticed fact must be "generally known universally, locally, or in the area pertinent to the event;" 201(b)(2) is the same as Fed. R. Evid. 201(b)(2); and 201(g) provides that "[t]he military judge shall instruct the members [of the court-martial] that they may, but are not required to, accept as conclusive any matter judicially noticed."

sources whose accuracy cannot reasonably be questioned," such that judicial notice could be taken under Mil. R. Evid. 201(b)(2).[9] *Id.* Finally, the court refused to take judicial notice of the jurisdictional element of the offense because to do so would infringe the defendant's right to jury trial: "even as to adjudicative facts which the judge judicially notices, the court-martial members have the final word, as they must be instructed under Mil R. Evid. 201(g)." *Id.* at 215.[10]. *See also United States v. Irvin*, 21 M.J. 184, 186-89 (C.M.A. 1986) (refusing, under *Williams*, to take judicial notice of "special maritime and territorial jurisdiction" in the first instance on appeal because to do so would violate defendant's right to jury trial and Mil. R. Evid. 201(g)).

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[9] Like the lower court's determination in *Williams* regarding Fort Hood, the Court of Appeals here held that Fort Belvoir's jurisdictional boundaries were "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b)(2). *Williams* illustrates that Rule 201(b)(2) cannot support judicial notice here. Nor could the district court properly have relied on Fed. R. Evid. 201(b)(1). Fort Belvoir's *jurisdictional status* -- specifically, whether the location of the alleged assault falls under exclusive or concurrent federal jurisdiction -- surely is not generally known. *See United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999) (Rule 201(b)(1) could not support judicial notice where "it is unlikely that the 'reasonable person' has any familiarity with [the Federal prison at issue] at all, let alone its jurisdictional status.").

[10] *United States v. Bartole*, 16 M.J. 534 (A.C.M.R. 1983), does not conflict with *Williams*. There, a lower Army court distinguished an earlier Court of Military Appeals opinion in *Williams*, which remanded the matter of the jurisdictional boundaries of Fort Hood to the lower court for an evidentiary hearing. *United States v. Williams*, 14 M.J. 428 (C.M.A. 1983). In the later *Williams* opinion, *United States v. Williams*, 17 M.J. 207 (C.M.A. 1984), *supra*, which was decided after *Bartole*, the court, after the evidentiary hearing was held, decided that it could not take judicial notice of whether the location of the crime fell under federal jurisdiction. The *Bartole* court, like the Fourth Circuit here, made no findings regarding the constitutionally required procedure discussed above for federally-acquired land to come within the "special maritime and territorial jurisdiction of the United States."

The Fourth Circuit's decision also directly conflicts with the Sixth Circuit's ruling in *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988). The defendant in *Mentz* was convicted of bank robbery under 18 U.S.C. § 2113(a), which requires that the bank's deposits were insured by the FDIC at the time of the robbery. *Mentz*, 840 F.2d at 318. The district court instructed the jury that the banks were insured by the FDIC at the time of the offenses, thereby removing that issue from the jury's consideration. *Id.* The Sixth Circuit reversed, finding that the district court's instruction violated the Sixth Amendment. The court held that "[t]here can be little doubt that a trial judge commits error of constitutional magnitude 'when he instructs the jury as a matter of law that a fact essential to conviction has been established by the evidence, thus depriving the jury of the opportunity to make this finding.'" *Id.* at 320 (citation omitted). Relying on *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the court held that such an instruction is tantamount to a directed verdict for the government, in violation of a defendant's constitutional right to trial by jury. *Mentz*, 840 F.2d at 320.

The court further held that principles of judicial notice could not rescue the constitutionally erroneous instruction because the district court failed to give the instruction required by Rule 201(g) that, in a criminal case, the jury need not accept facts judicially noticed as conclusive. *Id.* at 322. Pointing to the legislative history of Rule 201(g), the court noted that Rule 201(g) "preserves the jury's 'traditional prerogative to ignore even uncontroverted facts in reaching a verdict,' and thereby prevents the trial court from transgressing the spirit, if not the letter, of the Sixth Amendment right to a jury trial by directing a partial verdict as to the facts." *Id.* at 322, citing H.R. Rep. No. 650, 93d Cong., 1st Sess. 6-7 (1973), reprinted in 1974 U.S.C.C.A.N. 7075, 7080. Finally, the Sixth Circuit held that removing an element of the offense from the jury's consideration is not

subject to harmless error analysis, but requires automatic reversal. *Id.* at 324.[11]

The Ninth Circuit has affirmed a district court's judicial notice of a bank's FDIC-insured status where the district court gave a Rule 201(g) instruction, *United States v. Chapel*, 41 F.3d 1338, 1342 (9th Cir. 1994), but has also held that such judicial notice would violate the Sixth Amendment absent such an instruction. *United States v. Dior*, 671 F.2d 351 (9th Cir. 1982). In *Dior*, the district court granted defendant's motion for acquittal on the ground that there was no evidence that the stolen merchandise at issue was worth $5,000 or more, as required by 18 U.S.C. § 2314. The only evidence of the merchandise's value was its price in Canadian dollars. The government introduced no evidence of the American/Canadian exchange rate. The court rejected the dissent's argument that the district court should have taken judicial notice of the exchange rate in ruling on the motion to acquit. The court stated that doing so "would cast the court in the role of a fact-finder and violate defendant's Sixth Amendment right to trial by jury . . . by directing a partial verdict as to facts" and would violate Rule 201(g) since the jury would not have the chance to assess the facts judicially noticed. *Dior*, 671 F.2d at 358 n.11, citing *Jones*, *supra*.

In addition to the Fourth Circuit's decision here, three other Courts of Appeals have affirmed the district court's judicial notice of the jurisdictional element of a federal crime: *United States v. Hernandez-Fundora*, 58 F.3d 802, 807-812 (2d Cir. 1995); *United States v. Bowers*, 660 F.2d 527, 530-31 (5th Cir. 1981); *United States v. Piggie*, 622 F.2d 486 (10th Cir. 1980). Accordingly, this Court should resolve this split among the lower courts.

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[11] The Sixth Circuit had previously reached similar conclusions in an earlier case, *United States v. Jones*, 580 F.2d 219 (6th Cir. 1978).

II. The Fourth Circuit's Ruling Conflicts with this Court's Precedents Prohibiting a Directed Verdict for the Government on an Element of a Crime

The Fourth Circuit's affirmance of the district court's direction of a verdict on the jurisdictional element of the offense, in addition to conflicting with the Court of Military Appeals and the Sixth and Ninth Circuits, cannot be squared with this Court's decisions regarding the constitutionally protected right to jury trial in criminal cases. Due process requires proof beyond a reasonable doubt as to every element of a crime, and the Sixth Amendment requires that this standard be applied by a jury. *United States v. Gaudin*, 515 U.S. 506, 510-515 (1995); *Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *In re Winship*, 397 U.S. 358, 364 (1970). This Court has repeatedly and emphatically recognized that courts must be wary of judicial practices - even long-standing and commonly used practices - that deny a criminal defendant's Sixth Amendment and due process rights to have all issues affecting guilt or innocence determined beyond *the jury's* reasonable doubt, not the court's. *See generally Apprendi v. New Jersey*, No. 99-478, 2000 WL 807189 (U.S. June 26, 2000).

This Court has recognized the Framers' fears "that the jury trial right could be lost not only by gross denial, but by erosion." *Apprendi*, 2000 WL 807189 at *10. In *Apprendi*, which was decided while Petitioner's case was pending in the Fourth Circuit, this Court re-affirmed the critical importance of a jury determination of all elements of the offense beyond a reasonable doubt:

> [T]he "reasonable doubt" requirement has a vital role in our criminal procedure for cogent reasons . . . . Prosecution subjects the criminal defendant both to "the possibility that he may lose his liberty upon conviction and . . . the certainty that he would be stigmatized by the conviction . . . ." We thus require this, among other, procedural protections in order to "provid[e] concrete substance for the

> presumption of innocence," and to reduce the risk of imposing such deprivations erroneously. *Id.* (citations omitted).

The Fourth Circuit's decision contradicts not only *Apprendi* but also decades of this Court's precedent:

> [The jury's] overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . , regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

Martin Linen, 430 U.S. at 572-73. A judge's instruction that an element of the offenses has been established, without the opportunity for the jury to make such a finding, is tantamount to a directed verdict for the government, the result condemned in *Martin Linen*. *See Mentz*, 840 F.2d at 320.

This Court has recognized that a directed verdict for the government in a criminal case is such a fundamental structural flaw in the trial process that harmless error analysis does not apply to it. A directed criminal verdict is one of the few constitutional errors warranting automatic reversal:

> [H]armless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury . . . . Where [the Sixth Amendment right to jury trial] is altogether denied, the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty.

Rose v. Clark, 478 U.S. 570, 578 (1986). Moreover, "not only does the harmless-error doctrine not apply when the error consists in directing a verdict against a criminal defendant; it also does not apply when the judge directs a partial verdict against the defendant by telling the jury that one element of the crime -- such as guilty knowledge in this case -- has been proved beyond a reasonable doubt, so the jury needn't worry its collective head over that one." *United States v. Kerley*, 838 F.2d 932, 937 (7th Cir. 1988) (Posner, J.), citing *Rose*.

In *Arizona v. Fulminante*, 499 U.S. 279 (1991), this Court distinguished "trial error" (in which it included an involuntary confession) from "structural defects" so fundamental that they defy harmless error analysis. *Id.* at 307-09. Trial errors, the Court held, are those that occur during presentation of the case to the jury and "which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt." *Id.* at 307-08. Structural defects, on the other hand, are those that "affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. A directed verdict for the prosecution on an element of the offense clearly falls within the latter category: "although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence." *Sullivan*, 508 U.S. at 277. As noted by the *Rose* Court, the trial court's usurpation of the jury's role affects the entire framework of the trial because the wrong entity (the court, rather than the jury) judged the defendant guilty. *Rose*, 478 U.S. at 578.

CONCLUSION

The district court denied Petitioner's right to jury trial by taking judicial notice of the jurisdictional element of the offense, without giving the cautionary instruction required by Rule 201(g) that the jury need not accept such judicial notice as conclusive. The Fourth Circuit's opinion affirming the conviction directly conflicts with the decisions of the Court of Military Appeals and the Sixth and Ninth Circuits and undermines this Court's decisions protecting a criminal defendant's right to have a jury decide all elements of the offense beyond a reasonable doubt. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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December 22, 2000

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 00-4150

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

GRANT VENEY LEE,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CR-99-43-A)

Submitted: August 31, 2000
Decided: September 26, 2000

Before WILKINS, WILLIAMS, AND TRAXLER,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

Samuel J. Buffone, William M. Carter, Jr., ROPES & GRAY, Washington, D.C., for Appellant. Helen F. Fahey, United States Attorney, Robert A. Spencer, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Grant V. Lee was convicted by a jury of aggravated sexual abuse, 18 U.S.C.A. § 2241(a)(1) (West 1984 & Supp. 2000), and sentenced to 210 months imprisonment. He appeals, claiming that: (1) the district court plainly erred in permitting an expert witness to testify regarding the victim's credibility; (2) the evidence was insufficient to establish that he used force; (3) the district court abused its discretion in excluding evidence of the victim's past sexual experience with someone other than Lee; (4) the district court erred in taking judicial notice that Fort Belvoir is within the special maritime and territorial jurisdiction of the United States; and (5) the district court clearly erred in applying the "vulnerable victim" enhancement, *U.S. Sentencing Guidelines Manual*, § 3A1.1 (1998). Finding no error, we affirm.*

The evidence, viewed in the light most favorable to the government, *see United States v. Burgos*, 94 F.3d 849, 854 (4th Cir. 1996) (en banc), established the following. Lee and the victim ("LL") worked for "The Chimes," an organization that hires handicapped individuals to clean office buildings. LL is moderately to severely mentally retarded and has

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* We grant Lee's motion to file a supplemental appendix.

cerebral palsy; she also has a severe speech impediment. Lee is not handicapped.

On December 2, 1998, LL reported to her job at the Defense Logistics Agency at Fort Belvoir, Virginia. Between approximately 9:30 am and 10:30 am, Lee told "LL" to "come here," whereupon he took her to the basement of the building to a custodial supply closet. Once there, LL testified that Lee closed and locked the door behind them and then began to touch her breasts. LL told him to "stop it," but Lee continued to pull down LL's pants and to touch her "butt." LL again told Lee to "stop it" as he pulled down her underpants and began to touch her vagina; he than "pulled his penis out... [and] put it in [LL's] vagina." According to LL, Lee hurt her a "whole lot," and she attempted to push him away. Lee told LL not to tell anyone what he had done, and the two left the closet together; LL took the elevator back to the second floor (her assigned floor).

Joyce Ryland, Lead Worker at The Chimes, and Karen Ford, The Chimes Project Manager, saw LL get off the elevator on the second floor, looking "stunned" and with her hair out of place. LL told Ford that Lee had told her "to come here" and pointed to her breasts and buttocks, saying "Grant" repeatedly. According to Ford, LL said, "Grant f-----d me."

Another supervisor at The Chimes, Sheila Ann Carroll, testified that she saw LL get off the elevator on the fourth floor at approximately 10:15 am and that LL "was upset." LL told Carroll that she (LL) had been downstairs and that Lee had "f----d her." LL took Carroll to the basement and showed her the closet where Lee had assaulted her. Both Ford and Carroll remained with LL for approximately five hours, questioning her repeatedly on the details of the assault. Carroll stated that she had intentionally tried to "trip [LL] up" because she "didn't want to believe the story" but that LL's recitation of the details of the attack remained consistent.

At 5:30 that evening, LL's mother took her to the Dewitt Army Medical Center at Fort Belvoir to be examined. Dr.

Michael Halliday, who examined LL that evening, testified that he observed "what looked like abrasions and stretch marks to the sides of LL's vagina." According to Halliday, the "stretched areas . . . looked like the tissue had been stretched rapidly and suddenly. . . . along the walls there appeared to be linear marking that were red, or erythema, and showed signs of recent trauma with a little bit of dark maroon or light brown blood in the vagina." This type of injury, according to Halliday, "occur[s] during too rapid of a child birth where the tissues doesn't [sic] have time to stretch." Halliday stated that, in his opinion, LL's trauma had occurred "less than 12 to up to 24 hours . . . . [p]robably more to the earlier, around 12 hours or so" prior to his examination. No semen was found in or around LL's vagina.

At trial, the government called Dr. Andrew Molchon as an expert witness in psychiatry to testify regarding LL's intellectual capabilities and limitations. According to Dr. Molchon, LL:

> lacks the ability to . . . think in abstract terms . . . . So, you know, she might be able to identify say an orange and a grapefruit, but she would lack the ability to think in terms of citrus fruits . . . . She also has the ability to think sequentially. That if A is true, then B would be true . . . . So I think her reasoning is defective in two ways. Number one, the concreteness of it. And number two, the ability to have a chain of cause and events.

Dr. Molchon was asked a series of questions regarding LL's ability to answer simple versus complex questions and her ability to relate events. In one response, Dr. Molchon stated that LL "would lack that type of ability to put together a credible, cohesive story if it were a falsehood." However, he also conceded that with "persistent" and "systematic" questioning, it would be possible to "plant" a false memory with LL.

Finally, Lee testified and admitted that he asked LL to accompany him to the basement closet and that he tried to kiss her but that LL avoided him. He admitted on cross-examination that he tried to grope LL and that he touched her "butt" and her vaginal area, and also that he touched her breasts. Lee also admitted that he wanted to have sex with LL, but denied having had intercourse with her. The jury convicted Lee of aggravated sexual abuse. He noted a timely appeal.

Lee first claims that the district court improperly allowed Dr. Molchon to testify as to the victim's credibility. Lee failed to object at trial, however, and therefore his claim is reviewed only for plain error pursuant to Fed. R. Crim. P. 52(b), *See United States v. Brewer*, 1 F.3d 1430, 1434-35 (4th Cir. 1993); *United States v. Olano*, 507 U.S. 725, 732-37 (1993). We find no plain error in the admission of Dr. Molchon's testimony.

The general rule is that an expert witness may not give an opinion with respect to the defendant's or a witness' credibility. *See United States v. Cecil*, 836 F.2d 1431, 1441 (4th Cir. 1988). "[A]n expert's opinion that another witness is lying or telling the truth is ordinarily inadmissible pursuant to Rule 702 because the opinion exceeds the scope of the expert's specialized knowledge and therefore merely informs the jury that it should reach a particular conclusion." *United States v. Shay*, 57 F.3d 126, 131 (1st Cir. 1995). On the other hand, "no constitutional provision, law, or rule requires the exclusion of expert testimony simply because it concerns a credibility question." *Id.*

Here, Dr. Molchon described LL's mental retardation, reading and writing ability, and conversational limitations. And although Dr. Molchon did state that "she would lack that type of ability to put together a credible, cohesive story if it were a falsehood," he also conceded that it might be possible to falsely convince her that a sexual assault had occurred. Read in context, we find that Dr. Molchon's testimony on direct examination merely defined the limitations of LL's

intellectual capabilities and left the ultimate determination as to whether or not she was telling the truth to the jury. Moreover, the district court properly instructed the jury that "[y]ou are the sole judges of the credibility of the witnesses and the weight their testimony deserves." The law presumes that jurors follow their instruction. *See Olano*, 507 U.S. at 750.

On cross-examination, the following exchange took place:

> Q. Doctor, you have just given an opinion based on whether you believe she is telling the truth with respect to the event that occurred, correct?
>
> A. Whether or not she was lying, yes.

Any error in allowing this testimony was invited by Lee's attorney. As such, he is prohibited by the invited error doctrine from obtaining any relief on this claim. *See United States v. Jackson*, 124 F.3d 607, 617 (4th Cir. 1997).

Second, Lee claims that there was no evidence of force to support a conviction of aggravated sexual abuse. We find that the government presented sufficient evidence to establish that Lee used "force" within the meaning of the statute. First, LL testified in detail regarding the rape, that Lee shut and locked the door, then forcibly pulled down her pants and underwear and had sexual intercourse with her, all while she was telling him to stop and trying to push him away. *See United States v. Allery*, 139 F.3d 609, 611 (8th Cir. 1998) (evidence of restraint suffices to prove the element of force under § 2241). In addition, the jury could infer that force was used by Lee based on the medical testimony with respect to the physical trauma LL sustained. Finally, the disparity in intellect and size-Lee is 5'10", LL is 4'11" and weighs 84 pounds-were factors from which a reasonable juror could infer the use of force.

Next, Lee claims that the district court erred by excluding his proffered evidence that DM, a mentally-

handicapped co-worker of LL, claimed to have had sex with LL on three occasions some time before December 21, 1998. Federal Rule of Evidence 412 prohibits the admission of evidence of a rape victim's past sexual behavior except in three narrow circumstances: (1) when the evidence is constitutionally required; (2) when it is relevant regarding the source of semen or injury found on the victim; and (3) when it deals with prior sexual behavior between the victim and the accused and is relevant to the issue of consent. Because the evidence failed to meet any of these three exceptions, the district court did not abuse its discretion by excluding this evidence. *See United States v. Hassouneh*, 199 F.3d 175, 182 (4th Cir. 2000) (stating standard of review).

Lee also claims that the government failed to prove that the rape occurred in an area under federal jurisdiction. The district courts have jurisdiction over offenses committed on military bases. *See* 18 U.S.C. §§ 7(3), 3231 (1994); *United States v. MacDonald*, 531 F.2d 196, 198 n.1 (4th Cir. 1976). A district court may take judicial notice that the crime being prosecuted occurred within federal jurisdiction. *See United States v. Lavender*, 602 F.2d 639, 641 (4th Cir. 1977). Here, the indictment charged that the crime occurred at Fort Belvoir, Virginia. Fort Belvoir's location was generally known in the Alexandria Division of the Eastern District of Virginia and verifiable from "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Accordingly, we find no error in the district court's taking judicial notice of this fact.

Finally, Lee challenges the two-level enhancement he received under USSG § 3A1.1(b) for an offense involving an "unusually vulnerable victim." Section 3A1.1(b) applies "[i]f the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct." *Id.* In order to apply this provision, the district court must make two findings: (1) that the victim was unusually vulnerable; and (2) that the

defendant targeted the victim because of the victim's unusual vulnerability. *See United States v. Singh*, 54 F.3d 1182, 1191 (4th Cir. 1995). In other words, the district court must find that because of age, mental or physical condition, or any other relevant deficit, the victim was "more susceptible to abuse from a perpetrator than most other potential victims of the particular offense." *Id.* at 1191-92. And, the district court must play a role in the defendant's decision to select that victim as the target of the crime." *Singh*, 54 F.3d at 1191.

As to the first element, LL was clearly "unusually vulnerable: due to both her physical and mental condition. As to the second element, the district court could reasonably infer that LL's physical and mental deficiencies, which were known to Lee, at least played a role in his decision to select her as a victim.

Lee also challenges the enhancement under the Supreme Court's recent decision in *Apprendi v. New Jersey*, 530 U.S. _____, 68 U.S.L.W. 4576 (June 26, 2000) (No. 98-478). We find that, because Lee received a sentence of imprisonment and term of supervised release that did not exceed the statutory maximum set out in 18 U.S.C.A. § 2241(a)(1), no plain error occurred. *See United States v. Aguayo-Delgado*, _____F.3d _____, 2000 WL 988128, at *6 (8th Cir. July 18, 2000).

Accordingly, we affirm Lee's conviction and sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid in the decisional process.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 18, 2000

No. 00-4150
CR-99-43-A

MANDATE

The judgment of this Court dated 9/26/00 takes effect today.

PATRICIA S. CONNOR
CLERK

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

Cr. No. 99-43-A

UNITED STATES OF AMERICA

v.

GRANT V. LEE

Defendant.

PARTIAL TRANSCRIPT
(Court's Jury Instructions)

August 30, 1999

Before: Albert V. Bryan, Judge
And a Jury

APPEARANCES:

Patricia Haynes and Robert Spencer, Counsel for the U.S.
Alan Yamamoto, Counsel for the Defendant
The Defendant, Grant V. Lee, in person

* * * *

The Government must prove as one of the elements required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States.

The Government has offered evidence that the assault or the aggravated assault or the aggravated assault charged in the indictment occurred at Fort Belvoir, Virginia. The Court has taken judicial notice that Fort Belvoir, Virginia is within the jurisdiction of the United States for purposes of this statute.

If you find that the offense occurred at Fort Belvoir, Virginia, then you may find that this element has been proved.

If you find that the offense did not occur at Fort Belvoir, Virginia, then it is your duty to find the defendant not guilty.

* * * *

Supreme Court, U.S.
MAR 22 2001
CLERK

(2)

No. 00-1030

In the Supreme Court of the United States

GRANT VENEY LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court, after taking judicial notice of the fact that Fort Belvoir fell within the special maritime and territorial jurisdiction of the United States, properly instructed the jury that, if it found that petitioner's offense occurred at Fort Belvoir, it "may" find that the jurisdictional element had been proved.

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In the Supreme Court of the United States

No. 00-1030

GRANT VENEY LEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is unpublished, but the decision is noted at 230 F.3d 1355 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2000. The petition for a writ of certiorari was filed on December 22, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted under 18 U.S.C. 2241(a)(1) for committing aggravated sexual abuse "in the special maritime and ter-

ritorial jurisdiction of the United States or in a Federal prison." He was sentenced to 210 months' imprisonment. Pet. App. 2a. The court of appeals affirmed. *Id.* at 1a-8a.

1. Petitioner and his victim, referred to in the record by her initials "LL," worked at the Defense Logistics Agency (DLA) on the grounds of Fort Belvoir in Virginia. LL is moderately to severely mentally retarded and has a severe speech impediment and cerebral palsy. Petitioner is not handicapped. Pet. App. 2a-3a; Gov't C.A. Br. 2.

On December 21, 1998, LL reported to her job at the DLA. Between approximately 9:30 and 10:30 in the morning, petitioner directed LL to "come here." Petitioner then took LL to a custodial supply closet in the basement of the building. Pet. App. 3a. Once they were inside the closet, petitioner closed and locked the door. He began to touch LL's breasts. Though LL directed him to stop, he eventually engaged in intercourse with her. *Ibid.* This hurt LL a "whole lot" and she attempted to push petitioner away. Petitioner told LL not to tell anyone what he had done, and the two left the closet. *Ibid.*; Gov't C.A. Br. 4. LL did notify her supervisors about the sexual assault and later that day sought a medical examination that confirmed the assault. Pet. App. 3a-4a.

2. At trial, the district court charged the jury on the jurisdictional element of the offense as follows:

> *The Government must prove as one of the elements required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States.*

> The Government has offered evidence that the [offense] occurred at Fort Belvoir, Virginia. The Court has taken judicial notice that Fort Belvoir, Virginia is within the jurisdiction of the United States for purposes of this statute.
>
> If you find that the offense occurred at Fort Belvoir, Virginia, then you *may* find that this element has been proved.
>
> If you find that the offense did not occur at Fort Belvoir, Virginia, then it is your duty to find the defendant not guilty.

Pet. App. 11a (emphases added). Petitioner did not object to that instruction. The jury found petitioner guilty of aggravated sexual assault.

3. On appeal, petitioner argued, among other things, that the district court wrongfully took judicial notice of the jurisdictional element of 18 U.S.C. 2241(a) and failed to instruct the jury that it was not required to accept the judicial notice as conclusive. The court of appeals rejected the argument, first noting its long-standing view that a "district court may take judicial notice" of the jurisdictional element. Pet. App. 7a (quoting *United States* v. *Lavender*, 602 F.2d 639, 641 (4th Cir. 1979)). The court then held that judicial notice of the jurisdictional element was appropriate in petitioner's case because it was generally known within the jurisdiction of the trial court that Fort Belvoir is within the special maritime and territorial jurisdiction of the United States and this fact was "verifiable from 'sources whose accuracy cannot reasonably be questioned.'" *Ibid.* (quoting Fed. R. Evid. 201(b)).

ARGUMENT

Petitioner contends (Pet. 9-17) that the district court's instruction on the jurisdictional element was "tantamount to a directed verdict for the government" (Pet. 16) and thus violated "[p]etitioner's Sixth Amendment and due process rights to have a jury decide all elements of the crime beyond a reasonable doubt" (Pet. 9). That contention lacks merit and does not warrant this Court's review. The jury instructions explicitly stated that the jury was required to find the jurisdictional element of the crime beyond a reasonable doubt. The court then instructed the jury that it "may" find that element proved based on the court's taking judicial notice of the fact that Fort Belvoir is within the territorial jurisdiction of the United States for purposes of the statute under which petitioner was prosecuted. That instruction did not deprive the jury of a role in finding the jurisdictional element. In any event, even if the court had instructed the jury that its judicial notice was conclusive, such a decision would not have been error because the jurisdictional status of Fort Belvoir is a legislative, as opposed to an adjudicative, fact. In addition, petitioner did not object to the trial court's instruction to the jury and thus can prevail only if he can demonstrate that he suffered plain error from the instruction. For these reasons, further review is not warranted.

1. The premise of the petition—that the "district court * * * removed the determination of an element of the offense from the jury"—is not correct. In addition to the general instruction that the government must prove each element of the crime beyond a reasonable doubt, the jury instructions specifically stated that the "Government must prove as one of the elements

required to be proved beyond a reasonable doubt that the offense charged in the indictment occurred within the special maritime and territorial jurisdiction of the United States." Pet. App. 11. Then, after stating that the district court had taken judicial notice that Fort Belvoir is within the jurisdiction of the United States, the Court explained that "[i]f you find that the offense occurred at Fort Belvoir, Virginia, then you *may* find that this element has been proved." *Ibid.* (emphasis added). That instruction clearly did not require the jury to accept the fact judicially noticed.

Petitioner nevertheless argues that the instruction was defective because it did not include the precise language of Federal Rule of Evidence 201(g), which states that when a court takes judicial notice of an adjudicative fact in "a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed." As discussed *infra*, Rule 201(g) does not apply to the legislative fact of Fort Belvoir's jurisdictional status, and the court was therefore not required to frame an instruction in accordance with Rule 201(g). But even if the rule were applicable, it would not help petitioner. Although the jury instruction in this case used the word "may" and omitted the clause "but is not required to," petitioner cites no cases suggesting that a jury instruction must include the exact words "but is not required to" in order to avoid giving the jury the impression that it must accept as conclusive a matter of which the court took judicial notice. That impression was not created in this case. The court's recitation that the jurisdictional element, like all others, must be proved beyond a reasonable doubt and its use of the discretionary word "may" informed the jury that it was still the final arbiter of the jurisdictional element. In addition, the

sentence containing the word "may" was immediately followed by a sentence containing mandatory language: "If you find that the offense did not occur at Fort Belvoir, Virginia, then *it is your duty* to find the defendant not guilty." Pet. App. 11a. That contrast further highlighted that it was still within the discretion of the jury to accept or reject the fact that Fort Belvoir is "within the special maritime and territorial jurisdiction of the United States." *Id.* at 2a.

Because the jury was not instructed that it had to accept the fact judicially noticed, this "Court's precedents prohibiting a directed verdict for the Government on an element of a crime" (Pet. 15-17) are not implicated.

2. The due process and Sixth Amendment concerns raised in those cases are not implicated for yet another reason. The jurisdictional status of Fort Belvoir is a legislative fact rather than an adjudicative fact. The requirements of Federal Rule of Evidence 201 apply only to adjudicative facts, see Fed. R. Evid. 201(a) ("This rule governs only judicial notice of adjudicative facts."), and it is only with respect to adjudicative facts that courts have voiced due process and Sixth Amendment concerns when a court fails to notify the jury that it need not accept the fact judicially noticed as conclusive. Petitioner cites no cases stating that judicial notice of legislative facts raises these concerns. Thus, petitioner could not show plain error even if the trial court in this case had failed to instruct the jury that the government was still required to prove beyond a reasonable doubt the jurisdictional element of the crime.

Several courts of appeals have held that it is appropriate for a trial court to take judicial notice of the legislative fact whether a location is "within the special

maritime and territorial jurisdiction of the United States." See *United States* v. *Hernandez-Fundora*, 58 F.3d 802, 807-812 (2d Cir.), cert. denied, 515 U.S. 1127 (1995); *United States* v. *Bowers*, 660 F.2d 527, 530-531 (5th Cir. 1981) (per curiam); *United States* v. *Piggie*, 622 F.2d 486 (10th Cir.), cert. denied, 449 U.S. 863 (1980); *United States* v. *Blunt*, 558 F.2d 1245, 1247 (6th Cir. 1977) (per curiam). As the Second Circuit has explained, "[l]egislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally, while adjudicative facts are those developed in a particular case. * * * Unlike an adjudicative fact, [the fact that a place is under federal jurisdiction] does not change from case to case but, instead, remains fixed." 58 F.3d at 812 (citations omitted); see also *Bowers*, 660 F.2d at 531 ("Unlike an adjudicative fact, this fact does not change from case to case but, instead, remains fixed.").[1]

The jurisdictional status of Fort Belvoir is an established fact that does not change from case to case. Indeed, in 1983 a military court, on appeal, took judicial notice of the fact that Fort Belvoir fell within the special maritime and territorial jurisdiction of the United States. *United States* v. *Bartole*, 16 M.J. 534, 535 (A.C.M.R. 1983), aff'd, 21 M.J. 234 (C.M.A. 1986). The court pointed out that, as in petitioner's case, there was "no dispute that the offense occurred within the

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[1] A leading administrative law treatise supports this analysis: "Whether 123 C Street is inside or outside the city is a question about 123 C Street, not about a party. The question whether X lives in the city is a question of adjudicative fact, but, even though X lives at 123 C Street, the fact that that address is within the city is not an adjudicative fact." 2 Kenneth C. Davis & Richard J. Pierce, Jr., *Administrative Law Treatise* § 10.6, at 155 (3d ed. 1994), cited in *Hernandez-Fundora*, 58 F.3d at 812.

boundary of Fort Belvoir[,] and section 7.1-18.1 of the Code of Virginia (Supp. 1982) specifically provides that Virginia has ceded concurrent jurisdiction to the Federal Government over military forts of which Fort Belvoir is included." *Id.* at 536.

Two courts of appeals have taken a somewhat different approach to judicial notice of whether certain property is within the jurisdiction of the United States, but those decisions do not conflict with the result in this case. In *United States* v. *Bello*, 194 F.3d 18, 22-26 (1st Cir. 1999), the court held that the location of a prison within the jurisdiction of the United States was an adjudicative fact of which a court could take judicial notice under Federal Rule of Evidence 201(b). The court went on to hold that the jury must then be instructed that it may, but is not required to, accept the fact judicially noticed in accordance with Rule 201(g). But any tension between *Bello* and the decisions in other circuits cited above does not warrant further review in this case. The court in *Bello* specifically did not decide whether Section 201(g)'s approach "is constitutionally compelled," 194 F.3d at 26 n.10, and it noted that most States make judicially noticed facts binding on the jury, *ibid.* Moreover, nothing in *Bello* suggests that the court would find the permissive instruction given in this case to be deficient, particularly when no objection was made at the trial level and the issue is reviewable on appeal only for plain error. There is therefore no reason to believe that this case would have been decided any differently in the First Circuit.

In *United States* v. *Williams*, 17 M.J. 207 (1984), the United States Court of Military Appeals agreed that a trial court may be able to take judicial notice of the jurisdictional status of federal property. But it refused

to take judicial notice on appeal of the jurisdictional status of the property involved in that case, when the trial judge "was never requested to take judicial notice" and the case involved a number of factual "complications."[2] *Id.* at 212-214. While the court indicated that in that case, the existence of federal jurisdiction over the military installation at issue (Fort Hood) should have been left for decision by the court members at trial, *id.* at 215, the court's decision turned heavily on the complex nature of Fort Hood as an installation only part of which is subject to federal jurisdiction. The court took note of cases (such as *United States* v. *Blunt*, *supra*, and *United States* v. *Bowers*, *supra*) that had taken conclusive judicial notice of "the jurisdictional status of the location where an offense occurred," 17 M.J. at 213, and distinguished those cases, rather than rejecting them, on the ground that they "did not involve forts or other facilities of which, as here, only a part is subject to Federal jurisdiction," *id.* at 214. *Williams* thus does not hold that judicial notice of the jurisdictional status of all properties as a legislative fact is per se out of bounds. And in light of the established status of Fort Belvoir, judicial notice was appropriate here.[3]

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[2] In *Williams*, among other factual complications, the defendant was charged with kidnapping for allegedly forcing a person into his car, driving for a while, and then robbing the person. The victim testified that the kidnapping began at Fort Hood, but the defendant testified that the victim asked him for a ride outside of Fort Hood. 17 M.J. at 209-210.

[3] The other two cases that petitioner cites did not involve judicial notice of a site's location in "the special maritime and territorial jurisdictional of the United States," but involved judicial notice of the fact that a bank's deposits were FDIC-insured, see *United States* v. *Mentz*, 840 F.2d 315 (6th Cir. 1988) (prosecution

3. Even if the jury instruction was erroneous, petitioner would have to establish plain error because he did not object to the instruction in the district court. See Fed. R. Crim. P. 52(b). Under the plain error rule, before an appellate court can correct an error that was not raised at trial, "there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.'" *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). If those three conditions are met, "an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 467 (citations omitted).

Contrary to petitioner's assertion (Pet. 16-17) that a trial court's failure to submit an element of the crime to the jury is "such a fundamental structural flaw in the trial process" that "automatic reversal" is required, recent decisions of this Court hold that both harmless error analysis and plain error analysis are appropriate when a court decides an element of a crime on its own instead of submitting the element to a jury. *Neder* v. *United States*, 527 U.S. 1, 8-15 (1999) (holding that harmless error analysis applies to failure to include materiality element of crime in jury instructions); *Johnson*, 520 U.S. at 465-466 (holding that plain error

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under 18 U.S.C. 2113(a)), and of the exchange rate of American and Canadian currency, see *United States* v. *Dior*, 671 F.2d 351 (9th Cir. 1982) (prosecution under 18 U.S.C. 2314). Even with respect to those very different jurisdictional elements, the courts did not state that those elements were not judicially noticeable, but only that those elements involved adjudicative, rather than legislative, facts and thus the trial court could not require the jury to agree with the judicial notice. See *Mentz*, 840 F.2d at 320; *Dior*, 671 F.2d at 358 n.11.

analysis applies to failure to include materiality element of crime in instructions). As *Johnson* explained, "the seriousness of the error claimed does not remove consideration of it from the ambit of the Federal Rules of Criminal Procedure." *Id.* at 466.[4]

Petitioner cannot meet the plain error standard. As discussed above, a majority of the courts of appeals have concluded that the question whether a location is "within the special maritime and territorial jurisdiction of the United States" is a legislative fact and there is no law suggesting that court determinations of legislative facts raise due process and Sixth Amendment concerns. Thus, petitioner cannot show error, let alone obvious error. Even if petitioner could establish obvious error, removing an element of a crime from the consideration of the jury "does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. And

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[4] This Court's decision in *Apprendi* v. *New Jersey*, 120 S. Ct. 2348 (2000), did not alter the Court's holdings in *Neder* and *Johnson* that harmless or plain error analysis is appropriate when a jury instruction erroneously removes an element of the offense from the jury's consideration. In *Apprendi*, the Court merely held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-2363. In so holding, the Court did not purport to abrogate application of either the plain-error or harmless-error rules. Indeed, the courts of appeals have continued to apply the plain-error rule to cases involving *Apprendi* errors, and this Court has denied review of one of those decisions. *E.g.*, *United States* v. *Hishaw*, 235 F.3d 565, 574-576 (10th Cir. 2000); *United States* v. *Page*, 232 F.3d 536, 543-544 (6th Cir. 2000), petition for cert. pending, No. 00-7751; *United States* v. *Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000); *United States* v. *Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), cert. denied, 121 S. Ct. 834 (2001).

nothing suggests that petitioner was prejudiced by the instruction in this case or that he is entitled to relief as a matter of the court's discretion. See *Johnson*, 520 U.S. at 467. To the contrary, upsetting the verdict at this stage would undermine the fairness, integrity, and public reputation of judicial proceedings. *Id.* at 470.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2001

Supreme Court, U.S.
FILED
APR 6 2001
OFFICE OF THE CLERK

(3)

No. 00-1030

IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

GRANT VENEY LEE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY MEMORANDUM

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ARGUMENT

The United States' Brief in Opposition ("Gov. Brf.") presents for the first time in this case the fallacious argument that the jurisdictional element of the charged offense depends on "legislative" rather than "adjudicative" facts, so federal courts may take this element of the offense away from the jury without violating the Sixth Amendment, due process or Federal Rule of Evidence 201(g). Rather than support the United States' position, the government's new argument in fact highlights the conflict among the circuits that warrants review and resolution by this Court.

While some courts of appeals have held that whether the offense occurred within the "special maritime and territorial jurisdiction of the United States" is a legislative fact not

subject to Rule 201, *see* Gov. Brf. at 6-7 and cases cited therein, others have found jurisdictional facts to be "adjudicative" facts. The First Circuit, in reviewing whether the district court properly took judicial notice of the jurisdictional status of a federal prison, held that "[w]here the prison sits is an element of the offense and unquestionably an adjudicative fact . . . ." *United States v. Bello*, 194 F.3d 18, 23 (1st Cir. 1999). The Court of Military Appeals and the Sixth and Ninth Circuits also have squarely held that jurisdictional facts were adjudicative and that judicial notice of those facts was therefore subject to Rule 201. *See United States v. Williams*, 17 M.J. 207, 215 (C.M.A. 1984); *United States v. Mentz*, 840 F.2d 315, 322 n.13 (6th Cir. 1988); *United States v. Dior*, 671 F.2d 351, 358 n.11 (9th Cir. 1982).[1] *See also* Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5103 n. 16 (1999 Supp).

The government's new argument also begs the question whether the district court's instruction removing this element of the offense from the jury's consideration violates this Court's holdings on a defendant's constitutional right to a jury determination of all elements of the offense beyond a reasonable doubt. "Whether a fact is adjudicative or legislative depends not on the nature of the fact -- *e.g.*, who owns the land -- but rather on the use made of it (*i.e.*, whether it is a fact germane to what happened in the case or a fact useful in formulating common law policy or interpreting a statute) and the same fact can play either role depending on

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[1] Indeed, the Fourth Circuit in this case indicated that the jurisdictional question presented adjudicative facts. Using the words of Rule 201(b), the court held that judicial notice was proper because Fort Belvoir's location was "generally known" and verifiable from "sources whose accuracy cannot reasonably be questioned." App. 7a. Had the Fourth Circuit believed that the jurisdictional issues in this case were legislative facts, it would not have rested its holding on Rule 201(b), since Rule 201, by its terms, only applies to adjudicative facts. The government itself recognizes that the Fourth Circuit treated Fort Belvoir's jurisdictional boundaries as an issue of adjudicative fact subject to judicial notice under Rule 201(b). *See* Gov. Brf. at 3.

context." *Bello*, 194 F.3d at 22 (quoting Fed. R. Evid. 201, Advisor Committee's notes). Territorial jurisdiction is an element of the offense with which Petitioner was charged; labeling it as "legislative" does not mean it is no longer an element of the offense that must be submitted to a jury and be proved beyond a reasonable doubt. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 277-78 (1993); *Rose v. Clark*, 478 U.S. 570, 578 (1986); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977).

In any event, the jurisdictional status of a federal enclave is not immutable. The federal government may cede jurisdiction of all or part of a federal installation at any time or transfer property to a private entity, either of which may remove the property from the "special maritime or territorial jurisdiction of the United States" under Art. I, § 8, cl. 17 of the United States Constitution and 18 U.S.C. § 7(3). The jurisdictional status of the Defense Logistics Agency building where the alleged offense occurred therefore could have changed since the federal government acquired the grounds comprising Fort Belvoir and may change in the future. In *United States v. Goings*, 504 F.2d 809 (8th Cir. 1974), for example, defendants were charged with an assault within the special territorial jurisdiction of the United States on the grounds of Fort Lincoln. *Id.* at 810. The Eighth Circuit affirmed the dismissal of the federal prosecution because the United States had divested itself of exclusive jurisdiction over the area of the fort where the assault occurred when it transferred that property to a private corporation. *Id.* at 811-812. Equally, the jurisdictional status of the site of the alleged offense here must be proved beyond a jury's reasonable doubt as an element of the federal crime with which Petitioner was charged, and therefore is not properly treated as a legislative fact.

CONCLUSION

The petition for a writ of certiorari should be granted.

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